Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 77-841

ARTHUR F. QUERN, Director, Illinois Department of Public Aid and Successor in Office to JAMES L. TRAINOR,

Petitioner,

vs.

JOHN JORDAN, Individually and on Behalf of All Others Similarly Situated,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX

PETITION FOR WRIT OF CERTIORARI FILED DECEMBER 12, 1977
CERTIORARI GRANTED FEBRUARY 27, 1978

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
1-12-71	Filed Complaint for Declaratory Judgment, Equitable and Other Appropriate Relief.
1-14-71	Filed Motion for Temporary Restraining Order and Affidavit of Jeanette Bryant.
1-21-71	Enter order dated January 21, 1971: Enter Temporary Restraining Order and extension of said order until April 15, 1971, nunc pro tunc as of January 15, 1971. (DRAFT)—Napoli, J.
1-28-71	Filed Amended Complaint for Declaratory Judgment, Equitable and Other Appropriate Relief.
3-22-71	Filed Answer of Defendant Swank to Plaintiff's Amended Complaint.
4- 5-71	Filed Motion to Strike Certain Portions of Defendant's Answer.
4-15-71	Filed Plaintiff's Motion for Preliminary Injunction, and Brief in Support.
4-15-71	Enter order dated April 15, 1971: Enter order that Paragraphs 30 and 31 of Plaintiff's Amended Complaint are deemed admitted.—Napoli, J.
4-16-71	Enter order dated April 16, 1971: Enter Preliminary Injunction. (DRAFT)—Napoli, J.
7-27-71	Filed Motion for Order that Facts be taken as Established.
7-27-71	Enter order dated July 27, 1971: Enter order that Plaintiff's Motion for order that Facts be taken as Established is granted. Request for costs and attorneys fees is denied.—Napoli, J.

DATE	PROCEEDINGS
10-21-71	Filed Plaintiff's Motion for Summary Judgment, Permanent Injunction, and Other Relief.
11-10-71	Filed Plaintiffs' Brief in Support of Motion for Summary Judgment, Permanent Injunction, and Other Relief.
12- 1-71	Filed Defendant's Brief in Opposition to Motion of Plaintiffs for Summary Judgment, Permanent Injunction, and Other Relief.
12-10-71	Filed Plaintiffs' Reply Brief.
2- 4-72	Enter order dated February 4, 1972: Pursuant to Memorandum Opinion and Order, enter order granting summary judgment in favor of the plaintiff class and against defendant. Plaintiff is ordered to present within 20 days a proposed judgment order and decree. (DRAFT)—Napoli, J.
3-15-72	Entry of Judgment dated March 15, 1972. (DRAFT)—Napoli, J.
3-24-72	Filed Defendant's Notice of Appeal.
3-28-72	Filed Brief in Opposition to Retroactive Payments.
3-28-72	Filed Motion to Vacate Pursuant to Rule 60 of the Federal Rules of Civil Procedure.
3-28-72	Filed Motion for Stay Order.
3-28-72	Enter order dated March 28, 1972: Enter order that Defendant's motion to vacate pursuant to Rule 60 F.R.C.P. is denied.—Napoli, J.
4- 7-72	Filed Plaintiffs' Notice of Cross Appeal.

DATE	PROCEEDINGS
4- 7-72	Filed Plaintiffs' Brief in Support of Relief Granting AABD Benefits Wrongfully Withheld and in Opposition to Defendant Weaver's Motion for a Stay of the Entire Judgment.
5- 2-72	Enter order dated May 2, 1972: Enter order staying the effect of paragraph 5 of the judgment order entered March 15, 1972, relating to retroactive benefits, during Defendant Weaver's appeal. In other respects, defendant's motion for a stay is denied. (DRAFT)—Napoli, J.
2-15-73	Filed mandate and opinion of the United States Court of Appeals for the Seventh Circuit affirming the judgment of the district court and dissolving the stay with respect to paragraph 5 of the judgment.
7-24-73	Filed letter from the Supreme Court of the United States, with a certified copy of the order granting a stay of paragraphs 5 and 6 of the judgment.
11-25-74	Filed certified copy of order from the United States Court of Appeals for the Seventh Circuit dated October 29, 1974: Pursuant to mandate of the Supreme Court, it is ordered that the District Court's award of retroactive benefit payments to plaintiffs is reversed and cause is remanded to the court below with instructions to modify its judgment.
11-26-74	Filed Plaintiffs' Motion to Require Notice to Members of the Plaintiff Class, and memorandum in support.
12-10-74	Filed Defendant's Brief on Remand in Opposition to Plaintiff's Motion for Notice to the Class.

DATE	PROCEEDINGS
12-12-74	Filed Plaintiffs' Reply Memorandum in Support of Motion to Require Notice to Members of the Plaintiff Class.
1- 9-75	Filed Defendant's Motion to Deny Plaintiff's Request for Notice to Members of the Plaintiff Class and Brief in Support.
1-16-75	Filed Plaintiffs' Submissions in Response to the Court's Inquiries.
1-20-75	Filed Defendant's Supplemental Brief on Remand in Opposition to Plaintiffs' Motion for Notice to the Class.
8-22-75	Enter order dated August 22, 1975: Final Injunction and Judgment entered. (DRAFT)—Will, J.
9- 2-75	Filed Defendant's Notice of Appeal.
9- 9-75	Filed Defendant's Motion for a Stay Pending Appeal.
9- 9-75	Enter order dated September 9, 1975: enter order that Defendant's Motion for a Stay Pending Appeal is denied.—Will, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOHN JORDAN, by his next friend, JEANETTE BRYANT, individually and on behalf of all other persons similarly situated,
Plaintiffs,
vs.
HAROLD O. SWANK, Director, Illinois Department of Public Aid; DAVID DANIEL, Director, Cook County Department of Public Aid; EDWARD J. BARRETT, Comptroller of Cook County individually and in their official capacities,
Defendants.

NO. 71 C 70

AMENDED COMPLAINT FOR DECLARATORY JUDGMENT, EQUITABLE AND OTHER APPROPRIATE RELIEF

PRELIMINARY STATEMENT

1. Plaintiff, individually and on behalf of all other persons similarly situated, seeks primarily to have this Court declare mandatory and binding on the defendants federal regulations requiring (a) determinations of eligibility, and (b) actual receipt of Aid to the Aged, Blind and Disabled (hereinafter AABD) for those determined eligible, within thirty days from the date of application as

to aged and blind applicants for AABD, and within sixty days from the date of application as to disabled applicants for AABD, and further declaring void all state statutes and regulations inconsistent with said mandatory federal regulations. Plaintiff also seeks a declaration that the Illinois Public Aid Code, ch. 23, Section 3-1, Ill. Rev. Stat., federal law, 45 C.F.R. § 233.20(a) (1) (2) (iii), and equal protection of the laws as guaranteed by the fourteenth amendment to the United States Constitution, require AABD to be paid from the date of application if the applicant meets the eligibility conditions at the time of application.

JURISDICTION

2. Jurisdiction is conferred on this court by 28 U.S.C. § 1343 (3) (4) and by 28 U.S.C. § 1331. The amount in controversy, exclusive of interest and costs, exceeds the sum or value of $10,000.00.

3. Plaintiff's action for declaratory and injunctive relief, and for benefits wrongfully withheld is authorized by:

(a) 28 U.S.C. §§ 2201, 2202 and Rule 57 of the Federal Rules of Civil Procedure, which relate to declaratory judgments;

(b) 42 U.S.C. § 1983 which provides redress for the deprivation under color of law or rights, privileges, and immunities secured by the Constitution and laws of the United States.

PLAINTIFFS

4. The named plaintiff, John Jordan, age sixty-one, lives at 4241 W. Calumet, Chicago, Illinois, in a room of the apartment of Jeanette Bryant.

5. John Jordan has a substantial mental deficiency and functions at the level of a small child. Jeanette Bryant generally supervises most matters affecting the everyday life of John Jordan.

CLASS ACTION

6. The named plaintiff brings this action on his behalf and pursuant to Rule 23(a) and (b) of the Federal Rules of Civil Procedure, on behalf of all other persons similarly situated.

DEFENDANTS

7. Defendants are as follows: (a) Harold O. Swank, is the Director of the Illinois Department of Public Aid and is charged with statewide administration of the public assistance programs, including Aid to the Aged, Blind and Disabled, and with establishing regulations to carry out the statutory provisions of such programs; (b) David Daniel is the Director of the Cook County Department of Public Aid, an agency of the Illinois Department of Public Aid, and is responsible for administering the public assistance programs in Cook County; and (c) Edward J. Barrett, is the Comptroller of Cook County, responsible for the signing of emergency welfare checks.

FACTUAL ALLEGATIONS

8. John Jordan has a substantial mental impairment and functions at the level of a small child. He is unable to read or to recognize and count money. His intelligence is so limited that he requires supervision in most matters affecting his everyday life. His mental impairment is of a permanent nature and substantially impairs his ability to perform labor or services or to engage in any useful occupation.

9. On or about September 18, 1970 John Jordan applied for Aid to the Disabled at the Oakland office of the Cook County Department of Public Aid.

10. At the time of his application for Aid to the Disabled John Jordan met all the eligibility conditions for Aid to the Disabled, and he still meets said eligibility conditions, and is in all ways qualified for such assistance.

11. John Jordan, or friends acting on his behalf, have cooperated with the Cook County Department of Public Aid in all respects and have furnished all information requested by the Cook County Department of Public Aid and its employees.

12. The Cook County Department of Public Aid has yet to act on John Jordan's application for Aid to the Disabled and John Jordan has not received any such assistance from the defendants as of the date of filing this law suit.

13. The sole reason for the delay is that the caseworker of the Cook County Department of Public Aid assigned to John Jordan's application has not had time to act on John Jordan's application.

14. John Jordan has no income or assets except for the approximately $2.00 he earns by working at a drugstore one day a week and other infrequent odd jobs involving manual labor.

15. John Jordan is in dire need of monetary and medical assistance. He does not eat properly and is suffering from malnourishment because of lack of sufficient funds and is presently sick with a cold and cough and in need of medical care. Also he lacks vision in one eye and needs to be fitted for glasses.

has not been acted upon and approved, John Jordan has suffered and will continue to suffer irreparable injury, loss, and damage because of the lack of adequate funds to purchase those necessities requisite for a minimum standard of life compatible with health and well-being.

COUNT I

17. Count I is brought as a class action by the named plaintiff on his own behalf and on behalf of all other persons similarly situated pursuant to Rule 23(a) and (b) of the Federal Rules of Civil Procedure. The class is composed of all persons in Illinois eligible for Aid to the Aged, Blind, or Disabled, (AABD) who are required by defendants to wait longer than 30 days after application, as to aged and blind under AABD, and longer than 60 days after application, as to disabled under AABD, for a determination of eligibility and receipt of their first assistance check. This class is so numerous that joinder of all members is impractical. There are questions of law and fact common to the class. The claims of plaintiff are typical of the claims of the class. Plaintiffs will fairly and adequately protect the interests of the class.

18. Illinois participates in the Federal government's Program of Aid to the Aged, Blind, and Disabled (AABD), established by the Social Security Act, 42 U.S.C. Subchapter XVI, §§ 1381 et. seq. As a condition thereof, Illinois is required to conform with the requirements of the Social Security Act and regulations promulgated thereunder by the United States Department of Health, Education and Welfare.

19. The Social Security Act provides that

> "all individuals wishing to make application under the (AABD) plan shall have opportunity to do so and that such aid or assistance shall be furnished with reasonable promptness to all eligible individuals." 42 U.S.C. § 1382(a) (8).

20. At all times relevant herein, the regulations of the Department of Health, Education and Welfare have required that action on applications for assistance for the aged and blind under AABD be taken within thirty days, and action on applications for the disabled under AABD, be taken within sixty days, including for those determined eligible, the actual receipt of AABD assistance within the respective maximum time periods. Handbook of Public Assistance Administration, Part IV, Section 2200(b) (3) (4), Section 2300(b) (3) (5).

21. The defendants maintain that these abovementioned regulations are not mandatory and binding on them with respect to AABD applications.

22. As of the end of November, 1970, approximately 90% of the applications for assistance for the aged and blind under AABD made to the Cook County Department of Public Aid had been pending longer than 30 days. As of the end of November, 1970, approximately 70% of the applications for aid to the disabled under AABD made at the Cook County Department of Public Aid had been pending between one and six months and approximately 20% of the same applications had been pending for six months and over.

23. The rules and regulations of the defendant Illinois Department of Public Aid with respect to time standards for processing of AABD applications, Illinois Categorical Assistance Manual, Sections 4004-4004.3, are in violation of the requirements of the Social Security Act and regulations quoted above in paragraphs 19 and 20.

24. Further, at all times revelant herein, Section 8255 (and subsections thereunder), Illinois Department of Public Aid, Categorical Assistance Manual, has provided that initial grants (including AABD) may be authorized only for the month in which the application has been approved, but not for any prior months.

25. Pursuant to Section 8255, Illinois Categorical Assistance Manual, plaintiff John Jordan is barred from receiving AABD benefits for October, November, and December, 1970 in violation of the Social Security Act and regulations quoted above in paragraphs 19 and 20.

26. By failing to follow the maximum, permissible time standards under federal law (quoted above in paragraphs 19 and 20) the defendants and their agents acting under color of state law have unlawfully deprived plaintiffs of AABD assistance and their rights under the Social Security Act and the regulations issued pursuant thereto.

27. No adequate administrative remedy or remedy at law is available to the plaintiffs.

28. Plaintiffs have suffered irreparable damage to their health and well-being and will continue to suffer severe and irreparable injury because of the failure of defendants and their agents to comply with the respective 30 and 60 day requirements relating to AABD applicants.

COUNT II

29. Count II is brought as a class action by the named plaintiff on his own behalf and on behalf of all other persons similarly situated pursuant to Rule 23(a) (b) of the Federal Rules of Civil Procedure. The class is composed of all applicants for AABD in Illinois who meet the eligibility requirements when they apply but are denied bene-

fits for the intervening period from the date of application to the month in which their grant is authorized. This class is so numerous that joinder of all members is impractical. There are questions of law and fact common to the class. The claims of plaintiff are typical of the claims of the class. Plaintiffs will fairly and adequately protect the interests of the class.

30. Some eligible applicants for AABD similarly situated to John Jordan applied for AABD benefits in September, 1970, and were determined eligible in said month and began receiving assistance in and for said month.

31. Some eligible applicants similarly situated to John Jordan applied for AABD benefits in September, 1970, and were determined eligible in October, some were determined eligible in November, and some were determined eligible in December, and as a consequence, said applicants began receiving assistance in and for October, November, and December respectively, but not for any period prior to the month in which they were determined eligible.

32. By delaying determinations of eligibility, the defendants lessen expenditures to the needy for basic subsistence payments.

33. To condition the date upon which AABD benefits begin to the speed of the administrative process, is to establish wholly arbitrary and invidious classifications between similarly situated, equally needy persons.

34. Section 8255 of the Illinois Categorical Assistance Manual is invalid and unconstitutional on its face and as applied to plaintiffs in violation of the equal protection clause of the fourteenth amendment to the Constitution of the United States.

35. The policy of the defendant Illinois Department of Public Aid, and the practices of its 102 agent County De-

partments of Public Aid throughout the State of Illinois, do not require AABD assistance to be paid from the date of application when the applicant meets all of the eligibility conditions at that time.

36. The policy and practices of the defendants described in paragraph 35 above and in this Count are in violation of the Social Security Act, 42 U.S.C. § 1381 et. seq. and federal regulations issued thereunder, 45 C.F.R. § 233.20 (a) (1) (2) (iii), and Department of Health, Education and Welfare Handbook of Public Assistance Administration, Part II, § 3300, § 4300.

37. The policy and practices of the defendants described in paragraph 35 above and in this Count are in violation of the Illinois Public Aid Code, ch. 23, Section 3-1, Ill. Rev. Stat. which provides that financial aid

> "shall be given under this Article to or in behalf of aged, blind, or disabled persons who meet the eligibility conditions . . ."

38. Plaintiffs have suffered and will continue to suffer irreparable injury to their health and well-being because of the policy and practice of the defendants described in paragraph 35 above and in this Count.

39. No adequate administrative remedy or adequate remedy at law is available to plaintiffs.

WHEREFORE, plaintiff respectfully prays, on behalf of himself and all others similarly situated, that this Honorable Court:

1. Enter a temporary restraining order enjoining the defendants, their successors in office, agents and employees, and all other persons in active concert and participation with them, from continuing to cause irreparable harm to plaintiff and other persons similarly situated by failing to make determinations of eligibility and providing AABD

assistance for those determined eligible, within 30 days from the date of application as to aged and blind applicants for AABD, and within 60 days from the date of application as to disabled applicants for AABD.

2. Enter preliminary and permanent injunctions enjoining defendants, their successors in office, agents and employees, and all other persons in active concert and participation with them, from failing to comply with the federal 30 and 60 day requirements with respect to applicants for AABD in the State of Illinois.

3. Enter a final judgment declaring Illinois Categorical Assistance Manual Sections 4004 and 8255 (and subsections thereunder) as applied to applicants for AABD invalid insofar as they are inconsistent with the Social Security Act and regulations issued pursuant thereto.

4. Enter a final judgment declaring that the Illinois Public Aid Code, ch. 23, Sections 3-1, Ill. Rev. Stat., the Social Security Act and regulations thereunder, and equal protection of the laws as guaranteed by the fourteenth amendment to the United States Constitution require that applicants for AABD who meet the eligibility conditions for AABD at the time of their application are entitled to AABD benefits from the date of application.

5. Enter a permanent injunction enjoining the defendants to award to the entire class of plaintiffs all AABD benefits wrongfully withheld.

6. Allow punitive damages in the amount of $100,000.00 against Harold O. Swank.

7. Allow plaintiff his costs herein, and also grant him and all persons similarly situated, such additional or alternative relief as may seem to this Court to be just, proper and equitable.

Respectfully submitted,

/s/ Sheldon Roodman

/s/ Kenneth K. Howell

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge,
Honorable Alexander J. Napoli

Cause No. 71C70 Date April 16, 1971

Title of Cause

[Caption omitted in printing]

Enter preliminary injunction. (DRAFT)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Caption omitted in printing]

This matter coming on for hearing on plaintiffs' motion for a preliminary injunction on Count I of the amended complaint, and the defendants having received notice and being represented by counsel, and the Court having considered the amended complaint, affidavits, exhibits, and memoranda presented by plaintiffs, answers and exhibits of the defendants, and also the representations and arguments of counsel for all parties in open court, and being fully advised in the premises; it makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiff John Jordan applied to the Cook County Department of Public Aid on September 18, 1970, for Aid to the Disabled under the Aid to the Aged, Blind and Disabled (hereinafter "AABD") program; and

2. Plaintiff, John Jordan, age sixty-one, with the assistance of his friends, cooperated in all respects with the Cook County Department of Public Aid, furnished all information requested by the Cook County Department of Public Aid, and has been and is eligible for AABD;

3. As of January 14, 1971, the application of John Jordan for AABD had not yet been acted upon by the Cook County Department of Public Aid, and John Jordan had received no assistance whatsoever;

4. Pursuant to the temporary restraining order previously entered by this Court, John Jordan was determined eligible for AABD(D) and was issued AABD assistance. John Jordan was granted AABD assistance for the month of January, 1971 but no assistance for any period prior to January 1, 1971;

5. Numerous other persons have made applications for AABD to the Cook County Department of Public Aid and many such applications have been pending in excess of thirty days from the date of application as to aged and blind under AABD and in excess of sixty days as to disabled under AABD, with a number having been pending longer than six months;

6. Defendant Harold O. Swank is the Director of the Illinois Department of Public Aid and is charged with statewide administration of the categorical aid programs, including Aid to the Aged, Blind and Disabled, and with establishing regulations to carry out the statutory provisions of such programs. Defendant David Daniel is the

Director of the Cook County Department of Public Aid, an agency of the Illinois Department of Public Aid and is responsible for administering the categorical aid programs, including AABD, in Cook County. Defendant Edward J. Barrett is the Comptroller of Cook County, responsible for the signing of emergency welfare checks in Cook County; and

7. The named plaintiff has brought this Count I as a class action on his own behalf and on behalf of all other persons in Illinois eligible for AABD who are required by defendants to wait longer than thirty days after application, as to aged and blind under AABD, and longer than sixty days after application as to disabled under AABD, for a determination of eligibility and receipt of their first assistance check.

8. This class is so numerous that joinder of all members is impracticable. There are questions of law and fact common to the class. The claims of plaintiff are typical of the claims of the class. Plaintiffs will fairly and adequately protect the interests of the class. The defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate injunctive relief with respect to the class as a whole.

9. Those persons composing this class are, and will continue to be, irreparably injured by the failure of the defendants to process their applications and to provide AABD assistance within the maximum time periods permissible under federal regulations in that they lack sufficient funds to obtain necessary food, clothing, housing and medical care.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties to this action and over the subject matter of the action.

2. The hereinabove findings of facts establish that the Cook County Department of Public Aid and the Illinois Department of Public Aid have not complied with the Handbook of Public Assistance Administration, Part IV, Sections 2200(b) (3) (4), 2300 (b) (3) (5) and 45 C.F.R. § 206.10(a) (3), 36 Fed. Reg. 3864 (February 27, 1971) and the Court is at this time satisfied that plaintiffs are likely to prevail on the mandatory and binding nature of these regulations. *Rodriguez* v. *Swank*, 318 F. Supp. 289 (N.D. Ill., 1970) (three judge court).

3. Count I of this action is properly maintainable as a class action as defined in paragraph 7 *supra*. Federal Rules of Civil Procedure, 23(a) and (b).

4. Plaintiff and the members of the class will suffer immediate and irreparable injury if preliminary injunctive relief is denied.

5. Plaintiff and the class he represents are entitled to a preliminary injunction as hereinafter set forth.

PRELIMINARY INJUNCTION

IT IS ORDERED, ADJUDGED, and DECREED that the defendants, their agents and employees, and all persons in active concert and participation with them, are hereby enjoined from failing to make determinations of eligibility and mailing either AABD assistance or notifications of denial of assistance, within thirty days from the date of application as to aged and blind applicants for AABD, and within sixty days from the date of application as to disabled applicants for AABD in the State of

Illinois except in those cases where it is impossible to make a determination of eligibility because of failure or delay on the part of the applicant to provide essential information within the applicant's control and understanding.

IT IS FURTHER ORDERED, that the entitlement of all eligible AABD applicants in the State of Illinois shall attach no later than the thirtieth (30th) day after application as to aged and blind applicants, and no later than the sixtieth (60th) day after application as to disabled applicants. In any case in which eligibility is determined subsequent to the thirtieth (30th) day or sixtieth (60th) day, respectively, the applicant shall be entitled to AABD assistance retroactive at the very least to the thirtieth (30th) day or sixtieth (60th) day respectively, except in those cases where it was impossible to make a determination of eligibility because of failure or delay on the part of the applicant to provide essential information. In such latter cases, said applicants must receive a written statement explaining (a) that the denial was based on the failure or delay on the part of the applicant to provide specified essential information, and (b) that the applicant has the right to appeal within sixty (60) days this decision of the County Department of Public Aid.

IT IS FURTHER ORDERED, to the extent that the Illinois Department of Public Aid, Categorical Assistance Manual, Sections 4004, 8255, and 8256, and subsections thereunder, are contrary to this preliminary injunction, these sections are contrary to federal law, and are hereby declared null and void.

IT IS FURTHER ORDERED that defendants award John Jordan his entitlement to AABD assistance as hereinabove defined.

IT IS FURTHER ORDERED that this preliminary injunction be and remain in full force and effect until final hearing of this cause and until further order of this Court.

ENTER:

Alexander J. Napoli
United States District Judge

DATED: April 16, 1971.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge,

Honorable Alexander J. Napoli

Cause No. 71C70 Date March 15, 1972

[Caption omitted in printing]

Brief Statement of Motion: Entry of judgment

Ordered that David L. Daniel, Edward J. Barrett and Edward T. Weaver, their agents, et al. are permanently enjoined from failing to make determination of eligibility, etc.

Further ordered that Edward T. Weaver, et al., are enjoined to release and remit AABD benefits wrongfully withheld etc.

Within 15 days of this date, Edward T. Weaver shall submit to the Court and counsel a detailed statement as to the method for effectuating relief, etc.

Defendants shall submit to the Court and counsel a detailed monthly report until such time as these reports indicate compliance with the terms of this order for six months.

Defendant Edward T. Weaver shall issue a bulletin to the Illinois Department of Pubic Aid incorporating this judgment within 15 days.

Plaintiffs prayer for punitive damages against Harold O. Swank is denied.

This Court shall retain continuing jurisdiction for all purposes. (DRAFT)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Caption omitted in printing]

JUDGMENT

This action came on for hearing before the Court, Honorable Alexander J. Napoli, United States District Court, and the issues having been duly heard and a Memorandum Opinion and Order having been duly rendered on February 4, 1972,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED:

1. The defendants DAVID L. DANIEL, Director, Cook County Department of Public Aid, and EDWARD J. BARRETT, Comptroller of Cook County, and EDWARD T. WEAVER, Director, Illinois Department of Public Aid, their agents, including all of the County Departments of Public Aid in the State of Illinois, their employees, and all persons in active concert and participation with them, are hereby permanently enjoined from failing to make determinations of eligibility and mailing either the first full AABD assistance check or notification of denial of assistance, within thirty days from the date of application as to applicants for aid to the aged and blind under the AABD program in the State of Illinois, and within sixty days from the date of application as to applicants for aid to the disabled under the AABD program in the State of Illinois, except as provided in paragraph 3, infra.

2. The entitlement of all eligible AABD applicants in the State of Illinois shall attach no later than the thirtieth (30th) day from the date of application as to aged

and blind applicants, and no later than the sixtieth (60th) day from the date of application as to disabled applicants. In any case in which eligibility is determined subsequent to the thirtieth day or sixtieth day, respectively, the applicant shall be entitled to AABD assistance retroactive at the very least to the thirtieth (30th) day or sixtieth (60th) day, respectively, subject only to the exception in paragraph 3, infra. If the applicant is denied AABD assistance retroactive to the thirtieth (30th) or sixtieth (60th) day, respectively, pursuant to paragraph 3, infra, said applicant must receive a written statement explaining (a) the unusual circumstances, referred to in paragraph 3, upon which the denial is based, and (b) that the applicant has the right to appeal within sixty (60) days this decision of the County Department of Public Aid.

3. The thirty-day requirement as defined in paragraphs 1 and 2 and in 45 C.F.R. § 206.10(a) (36 Fed. Reg. 3864, February 29, 1971) shall be strictly complied with except in unusual circumstances, e.g., where the agency cannot reach a decision because of failure or delay on the part of the applicant or an examining physician, or because of some administrative or other emergency that could not be controlled by the agency, in which instances the case record shows the cause for the delay.

4. Illinois Categorical Assistance Manual, Section 4004, and subsections thereunder, as applied to applicants for AABD are invalid insofar as they are inconsistent with the requirements of paragraphs 1 and 2, supra.

5. That the defendant EDWARD T. WEAVER, Director, Illinois Department of Public Aid, his agents, including all of the County Departments of Public Aid in the State of Illinois, and employees, and all persons in active concert and participation with them, are hereby enjoined to release

and remit AABD benefits wrongfully withheld to all applicants for AABD in the State of Illinois who applied between July 1, 1968 and April 16, 1972, and were determined eligible, as follows:

(a) For those aged and blind applicants whose first full AABD check was not mailed within thirty days from the date of application, AABD assistance for the period beginning with the thirtieth day from the date of application to the date the applicant's entitlement to AABD became effective;

(b)(i) For those disabled applicants who applied between July 1, 1968 and December 31, 1970, whose first full AABD check was not mailed within forty-five days from the date of application, AABD assistance for the period beginning with the forty-fifth day from the date of application to the date the applicant's entitlement became effective;

(ii) For those disabled applicants who applied between January 1, 1971 and April 16, 1971, whose first full AABD check was not mailed within sixty days from the date of application, AABD assistance for the period beginning with the sixtieth day from the date of application to the date the applicant's entitlement became effective.

These AABD benefits shall be mailed to those persons currently receiving AABD within eight months with an explanatory letter, said letter having been first approved by plaintiffs' attorney. Any AABD benefits received pursuant to this paragraph shall not be deemed income or resources under Article III of the Illinois Public Aid Code.

For those persons not presently receiving AABD:

(a) A certified letter (return receipt requested), said letter having been first approved by plaintiffs' attorney, shall be sent to the last known address of the person, informing him in concise and easily understandable terms that he is entitled to a specified amount of AABD benefits wrongfully withheld, and that he may claim such amount by contacting the County Department of Public Aid at a specified address, within 45 days from the receipt of said letter.

(b) If the County Department of Public Aid does not receive a claim for the AABD benefits within 45 days from the date of actual notice to the person, the right to said AABD benefits shall be forfeited and the file shall be closed. Persons who do not receive actual notice do not forfeit their rights to AABD benefits wrongfully withheld under this provision.

6. Within 15 days from the date of this decree, defendant EDWARD T. WEAVER, Director, Illinois Department of Public Aid, shall submit to the Court and the plaintiffs' attorney a detailed statement as to the method for effectuating the relief required by paragraph 5, supra, of this Decree. Any disputes between the parties as to whether the procedures and steps outlined by the defendant WEAVER will fulfill the requirements of this Decree will be resolved by the Court.

7. The defendants shall have the continuing obligation to submit to the Court and to the plaintiffs' attorney a detailed monthly report indicating the number of AABD applications disposed of by length of time from the date of application, for each county in the State of Illinois, and such other information which accurately reflects the time for processing AABD applications, until such time that such reports establish compliance with the terms of this order for six months.

8. Defendant EDWARD T. WEAVER, Director, Illinois Department of Public Aid, shall issue a bulletin of the Illinois Department of Public Aid incorporating the essence of this judgment within 15 days from the entry thereof.

9. This judgment shall be binding upon defendants, their officers, agents, servants, employees and their successors, and upon those persons in active concert or participation with them who receive actual notice of the judgment by personal service or otherwise.

10. The prayer of the plaintiffs for punitive damages against the defendant HAROLD O. SWANK is hereby denied.

11. This Court shall retain continuing jurisdiction over this cause for all purposes.

ENTER:

Alexander J. Napoli, Judge
United States District Court

Dated: March 15, 1972

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604
October 29, 1974
Before

Hon. JOHN S. HASTINGS, Senior Circuit Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. MYRON L. GORDON, District Judge*

JOHN JORDAN, et al.
Plaintiffs-Appellants,
No.s. 72-1380, 1381
vs.
JOEL EDELMAN, et al.
Defendants-Appellees.

On remand from the Supreme Court.

ORDER

On March 25, 1974, the Supreme Court entered a judgment reversing this Court's judgment in this appeal (see 472 F. 2d 985) and remanding for further proceeding consistent with its opinion. See 415 U.S. 651. Further briefs were filed and considered in this Court after the remand.

Pursuant to the mandate of the Supreme Court, it is ordered that the district court's award of retroactive benefit payments to plaintiffs is reversed and the cause is remanded to the court below with instructions to modify its judgment as necessary in order to insure that entitlement need not attach to applicants in Illinois any earlier than

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* District Judge Myron L. Gordon of the Eastern District of Wisconsin sitting by designation.

required by the version of 45 C.F.R. § 206.10 in force on the date of application. Thus in accord with a recent amendment to 45 C.F.R. § 206.10(a) (3), entitlement shall not be required to attach to applicants for aged and blind benefits who apply after October 15, 1973, until 45 days after the date of application, rather than the 30 days provided for in the court below.

Costs to be borne by the respective parties.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Caption omitted in printing]

MOTION TO REQUIRE NOTICE
TO MEMBERS OF THE PLAINTIFF CLASS

Now comes plaintiff, individually and on behalf of all other members of the plaintiff class, and moves this Court for an order requiring the defendants to notify the members of the plaintiff class of their possible entitlement to retroactive benefits and their right to apply for benefits within sixty (60) days through the state's administrative procedures, and requiring said defendants to include with such notice a form returnable to the Department of Public Aid upon which such persons may indicate their desire to appeal.

In support of this motion, plaintiffs submit the accompanying memorandum.

/s/ Sheldon Roodman
Attorney for Plaintiff

Legal Assistance Foundation
of Chicago
64 East Jackson Boulevard
Chicago, Illinois 60604
922-5625

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Caption omitted in printing]

MOTION TO DENY PLAINTIFFS' REQUEST FOR NOTICE TO MEMBERS OF THE PLAINTIFF CLASS

NOW COMES Defendant, JAMES L. TRAINOR, Acting Director, Illinois Department of Public Aid, by and through his attorney, WILLIAM J. SCOTT, Attorney General, State of Illinois and moves this Court for an Order denying Plaintiff's Request for Notice to members of the Plaintiff Class and in support states as follows:

1. Plaintiff, on remand from the United States Supreme Court and the Court of Appeals for the Seventh Circuit, wherein Plaintiff sought and was denied retroactive benefits, now seeks from the District Court an Order requiring the Defendant to notify the members of the Plaintiff Class of their possible entitlement to retroactive benefits and other relief.

2. The law of this case is the United States Supreme Court's opinion in the instant suit holding that the Eleventh Amendment of the United States Constitution constitutes an absolute bar to the assumption and exercise of any and all jurisdiction relating, concerning, or in anyway involving retroactive relief against a sovereign state without its consent.

3. An Order requiring Defendant to notify members of Plaintiff's Class of their possible entitlement to retroactive benefits is a forbidden assumption of federal jurisdiction in contravention of the Eleventh Amendment.

4. As a Federal Court is absolutely without any and all power to enter an Order regarding retroactive benefits against a state without its consent, *a fortiori* this Court is precluded from exercising its traditional equitable powers to require the requested notice.

5. If the State complies with the informal request of this Court, made upon the parties on December 18, 1974, (see attached transcript of the proceedings) to provide the Court with information regarding the size of the class, cost-benefits to Plaintiffs, cost-burden to the State, etc., so as to assist the Court in balancing the equities of issuing the requested Order, then the State will have waived its Eleventh Amendment immunity to suit.

WHEREFORE, Defendant respectfully requests this Court to deny Plaintiff's request to require Notice to Members of Plaintiff's Class.

Respectfully submitted,

WILLIAM J. SCOTT
Attorney General of Illinois
160 North La Salle Street
Chicago, Illinois 60601

WILLIAM A. WENZEL
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Attorney General
(Of Counsel)
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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Caption omitted in printing]

PLAINTIFFS' SUBMISSIONS IN RESPONSE TO THE COURT'S INQUIRIES

In the December 18, 1974 hearing, this Court asked the parties to provide the court answers to the following inquiries. The plaintiffs submit the following information to the Court without any input from the Acting Director, Illinois Department of Public Aid, who refuses to respond to the Court's inquiries.

Q: (a) How many members are there of the *Jordan* class?

A: 20,000—33,500.

July 1, 1968 to April 16, 1971 consists of thirty-three and one-half months. Taking April 1971 as a typical month, plaintiffs estimate that approximately 750 to 1,000 aged, blind and disabled persons per month from July 1, 1968 to April 1971 were illegally deprived of AABD benefits to which they were entitled. Accordingly for the entire period, it is estimated that there are 25,000 to 33,500 members of the plaintiff class. (It may be that there were fewer AABD applicants in July 1968 than in April 1971 and a correspondingly fewer number of AABD applicants whose rights were violated. A more conservative estimate of the number of members of the plaintiff class might be 20,000.)

IDPA April 1971 Statistics (Exhibit A attached hereto)

Number of AABD Applications Disposed Of In Excess Of Time Standards

	Aged In Excess of 30 Days	*Blind In Excess of 30 Days*	*Disabled In Excess of 60 Days*
Cook	170	20	470
Statewide	264	25	763

Total aged, blind, and disabled members whose rights were violated in April 1971 = 1,052 persons.

Q: (b) What will be the cost to the Illinois Department of Public Aid ("IDPA") of identifying the members of the *Jordan* class?

A: This cost will only be the cost of running the computer. (See pp. 4-5, *infra.*)

Q: (c) What will be the cost to IDPA of notifying members of the *Jordan* class of their possible entitlement to retroactive benefits, as set out in plaintiffs' motion?

A: No additional cost to the IDPA will be necessary. Such notices may be included in one of the regular mailings to the members of the plaintiff class.

Q: (d) What are the benefit amounts which could accrue to individual members of the class (assuming notice were furnished and members of the class prevailed on administrative appeal)?

A: The benefit amounts to individual members of the plaintiff class will range from $5.00 to $2,000.00. The average benefit amount is likely to approximate $100.00. (In *Rodriguez* v. *Swank,* 69 C 2615, the case involving AFDC recipients, $551,871.00 was paid to 5,640 persons in Cook County whose applications were delayed.)

Q: (e) What is a fair estimate of the total aggregate benefits which will be paid if notice is furnished to the *Jordan* class, pursuant to plaintiff's motion?

A: While as much as $2 million may have originally been illegally denied members of the plaintiff class, plaintiffs estimate that anywhere from $500,000 to $1,500,000 might be paid to members of the plaintiff class, depending on the notice, hearing procedures, and other factors.

Q: (f) What would be the sources of (i) administrative costs; (ii) benefit payments made pursuant to any order to furnish notice to the class?

(g) Relative to (f), is federal or other reimbursement available for either said administrative costs or benefit payments or both?

A: Plaintiffs do not know what sources the defendants may be able to draw upon for those benefits.

Plaintiffs further bring to the Court's attention the following representations previously made by the defendant's counsel in this case. (Transcript of Proceedings, May 23, 1973, attached hereto as Exhibit B; Transcript of Proceedings, May 30, 1973, Exhibit C.)

> THE COURT: . . . So, I want some understanding that everything which would be necessary to comply with this order will be retained and will be available.
>
> MR. CARNOW: You have that representation, Your Honor . . . (Transcript of Proceedings, May 23, 1973, p. 9, Exhibit B.)
>
> • • •
>
> THE COURT: On the contrary, I would like to have some sort of indication by a communication to each of the heads of the Department of each of the 102 counties, that they, in fact, have been advised they have the obligation to retain these records so that your statement in open Court isn't just a statement on behalf of the Attorney General, which doesn't get down to the people who have the records.

> MR. CARNOW: Okay. (Transcript of Proceedings, May 23, 1973, p. 12, Exhibit B.)
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> • • •
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> MR. CARNOW: Your Honor, the request for a rule is premature. We were before your Honor last week in response to the very same rule.
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> Your Honor asked us at that time to make a statement on the record as to the availability and status of files, and input information so as to guarantee payment of the retroactive assistance in the event the Supreme Court should affirm the decision of the Seventh Circuit Court of Appeals.
>
> We are back here today to represent to your Honor that all the necessary input information that we need, we have on the computer tapes. That is the first matter . . . (Transcript of Proceedings, May 30, 1973, p. 3, Exhibit C.)

OTHER EQUITABLE CONSIDERATIONS

Finally, this Court should be fully advised of the following facts established in this case (Motion for Order that Facts Be Taken As Established, filed July 27, 1971, and Order granting said Motion, July 27, 1971):

"3. From July 1, 1968 to the present, Harold O. Swank has been fully advised and known that substantial numbers of applicants for AABD in the numerous counties of the State of Illinois have not had their applications acted upon and disposed of within the federally prescribed time maximums, and that these delays were not based on failure or delay on the part of the applicants; and for substantial numbers of these AABD applicants determined eligible, the effective date of their first assistance was not on or before 30 days from the date of their application, or, for disability applicants, on or before 45 days from the date of their application.

"4. From July 1, 1968 to the present, Harold O. Swank, Director, Illinois Department of Public Aid, was fully advised and knew and understood that substantial numbers of eligible AABD applicants in the numerous counties of the State of Illinois were being denied their entitlement to AABD assistance effective 30 days from the date of their application, or, with respect to disability applicants, effective 45 days from the date of their application, by the operation, implementation, and enforcement of Sections 8255 and 8255.1 of the Illinois Categorical Assistance Manual which prohibited the authorization of AABD assistance for any months prior to the month in which the application was approved.

"5. From July 1, 1968 to the present, Harold O. Swank, willfully and in gross disregard of the rights of eligible AABD applicants, knew that substantial numbers of eligible AABD applicants were being deprived, contrary to the requirements of federal law, of their full AABD entitlements effective 30 days from the date of their application, or, with respect to disability applicants, 45 days from the date of their application, by reason of the operation, implementation and enforcement of Sections 8255 and 8255.1 of the Illinois Categorical Assistance Manual.

"6. From July 1, 1968 to the present, Harold O. Swank, Director, Illinois Department of Public Aid, knew that as [a] result of the operation, implementation, and enforcement of Sections 8255 and 8255.1 of the Illinois Categorical Assistance Manual that the amount of assistance in initial grants and the eligibility conditions for initial grants

for AABD applicants were not made on an equitable and consistent basis and resulted in inequitable and arbitrary treatment of eligible AABD applicants in similar circumstances contrary to the purposes of the Social Security Act."

Respectfully submitted,

/s/ Sheldon Roodman,
Attorney for Plaintiffs
Legal Assistance Foundation
of Chicago
64 East Jackson Boulevard
Chicago, Illinois 60604
922-5625

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Caption omitted in printing]

MEMORANDUM OPINION

This case is now before the Court on remand from the decision of the United States Supreme Court in *Edelman v. Jordan*, 415 U.S. 651 (1974), and the order of the Seventh Circuit dated October 29, 1974 to this Court, and pursuant to the motion of the plaintiffs to require notice to members of the plaintiff class.

The only remaining question in this case relates to fashioning the appropriate relief, if any, to deal with defendant's illegal denial of public assistance benefits to the needy aged, blind, and disabled members of the plaintiff class, which consists of all needy aged, blind, and disabled persons who applied for Aid to the Aged, Blind and Disabled (AABD) at one of the offices of the Illinois Department of Public Aid between July 1, 1968 and April 16, 1971, and whose applications were illegally delayed in processing, and who, as a result, were illegally denied benefits to which they were entitled.

Upon finding that the plaintiff class was illegally denied benefits to which its members were entitled, the District Court, Judge Napoli presiding, entered a permanent injunction "to insure compliance, present and future, with the requisite time limitation," *(Jordan v. Swank*, 71 C 70, unpublished opinion, p. 2, February 4, 1972), and also ordered the state officials to release and remit AABD payments wrongfully withheld from those members of plaintiff's class, defined in the trial court's order to include:

> Those applicants who applied for AABD since the effective date of the regulations, July 1, 1968, and did not receive their initial check as required within the 30 day or 45 day (60 days for Aid to the Disabled as of January 1, 1971) limits. *Jordan v. Swank*, p. 3 *supra.*

The holding of the district court was affirmed by the Seventh Circuit in *Jordan* v. *Weaver,* 472 F. 2d 985 (7th Cir. 1973); in an opinion in which the Court upheld the relief granted by the trial court and agreed that the defendants, acting under color of state law, denied eligible welfare applicants timely assistance benefits to which they were entitled by federal rights, and held that the District Court properly ordered equitable restitution of the benefits wrongfully denied. *Weaver, supra,* at 994. Moreover, the Seventh Circuit held that the Eleventh Amendment to the Constitution did not deprive the federal court of jurisdiction to order the defendants to pay assistance benefits illegally denied members of the plaintiff class.

In *Edelman v. Jordan, supra,* the United States Supreme Court reversed that portion of the Seventh Circuit's opinion which affirmed the District Court's order that retroactive benefits be paid by Illinois State officials. The Court held that, under *Ex Parte Young*, 209 U.S. 123 (1908), the prospective portion of the District Court's order which enjoined state public aid from failing to process applications within federal time limits, did not contravene the guidelines of the 11th Amendment. On the other hand, *Ex Parte Young* did not, it continued, authorize ordering recovery from state funds of an accrued monetary liability. The test established by the Court in *Edelman,* for determining which claims against the unconsenting state are barred by the 11th

Amendment and which are permitted, is whether the award is by its terms prospective in nature, even though its implementation may have fiscal consequences. This characterization avoided the labeling of relief as equitable or monetary, which the Court found to be of little analytical benefit, and focused on the substance of the relief awarded. An ancillary fiscal impact in conjunction with the state's compliance in the future with a court order was held to be permissible under the 11th Amend ment. The Court also rejected the Seventh Circuit's theory that the State of Illinois had consented to suit for retroactive relief by participating in the federal AABD program, holding that such consent will be found to exist only where set out in explicit statutory language or overwhelming textual implication.

The question here is whether the relief requested by plaintiff is prospective in nature, notwithstanding the fiscal consequences of its award, or a retroactive award of monetary relief falling within the proscription of *Edelman v. Jordan, supra.*

The relief now requested by plaintiffs is neither one for retroactive monetary relief nor an injunction requiring the state to conform its conduct in the future to a set of standards. Rather, it involves only the sending of notices to members of the plaintiff class explaining their possible entitlement to retroactive benefits and the appropriate state administrative and appeals procedures to be followed in applying for those benefits. The requested relief, therefore, while related to possible retroactive benfits, is clearly not an award of those benefits. The plaintiffs contend that *Edelman* does not deprive this court of jurisdiction to grant the requested relief and cite authority in support thereof. The defendants argue that *Edelman* erects an absolute bar, based on the 11th Amendment,

to any order related in any possible way to payment of retroactive benefits by the state, that no existing authority supports the Court's ordering the state to send notices, and that plaintiffs are estopped by their pleadings to seek state administrative remedies.

The following language from the Supreme Court's opinion in *Edelman* indicates its concern with the award by a federal court of direct retroactive monetary relief against a state, rather than orders requiring the state to change existing policy or to inform citizens of their rights under state and federal law, even when a monetary loss would occur therefrom:

> We do not read *Ex parte Young* or subsequent holdings of this Court to indicate that any form of relief may be awarded against a state officer, no matter how closely it may in practice resemble a money judgment payable out of the state treasury, so long as the relief may be labeled "equitable" in nature. The Court's opinion in *Ex parte Young* hewed to no such line.
>
> • • • • •
>
> But that portion of the District Court's decree which petitioner challenges on Eleventh Amendment grounds goes much further than any of the cases cited. It requires payment of state funds, not as a necessary consequence of compliance in the future with a substantive federal-question determination, but as a form of compensation to those whose applications were processed on the slower time schedule at a time when petitioner was under no court-imposed obligation to conform to a different standard. While the Court of Appeals described this retroactive award of monetary relief as a form of "equitable restitution," it is in practical effect indistinguishable in many aspects from an award of damages against the State . . . . It is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials.

The instant case involves the awarding of non-monetary relief but related to the possibility of securing, through the state administrative apparatus, benefits illegally withheld from members of the plaintiff class. This relief falls outside the area proscribed by the Supreme Court's *Edelman* opinion.

The Eleventh Amendment seeks to avoid the clash of federal and state sovereigns. In this respect, a distinction exists between compensating individuals directly and notice that relief may be available. Even if the latter ultimately results in a direct award of benefits, federal interference in such an award would be minimal. The Eleventh Amendment by its terms denies jurisdiction to federal courts only of suits against one state by citizens of another or by citizens or subjects of a foreign state. While this has been read to preclude federal courts from ordering payments by states of state funds, it has never been held to prohibit federal courts from fashioning other appropriate relief in suits in law or in equity between citizens of a state and officials of the same state, e.g., writs of habeas corpus, injunction, mandamus, etc. Nor, do we believe, may it be used by a state to keep secret the fact that a number of its citizens may, under established state procedures, have valid claims against it. Accordingly, we conclude that ordering the sending of notices is not barred by the 11th Amendment to the Constitution.

Among the courts addressing the precise issue before us, none has denied the motion to require the sending of such notices. In *Grubb* v. *Sterrett*, 315 F. Supp. 990 (N.D. Ind. 1970), a pre-*Edelman* case, the court held a statewide welfare regulation to be contrary to the Social Security Act and, therefore, invalid under the Supremacy Clause. Because the state had provisions for hearings regarding corrective retroactive payments, the court did

not grant the retroactive monetary relief; rather, it remanded the claim for back benefits to the Indiana Department of Public Welfare and required the state to send notices to members of the plaintiff class. This course obviated the Court's consideration of any 11th Amendment objection to its jurisdiction to award retroactive monetary benefits.

In *Doe* v. *Gillman*, 479 F. 2d 646 (8th Cir. 1973), also pre-*Edelman*, the Eighth Circuit vacated a District Court decree requiring the Iowa Department of Public Aid to make retroactive payments on the ground that it was unnecessary to decide the 11th Amendment question, since the Iowa Department of Public Aid regulations specifically required the payment, following state administrative hearings, of benefits illegally withheld. It also upheld that portion of the District Court's order which held a section of the Iowa Code violated the Social Security Act and required the state to send a notice of eligibility to those previously denied benefits.

In *Morris v. Houston*, 0-250-73 C.A. (W.D. Mich. Oct. 18, 1974), the Court held that a Michigan Public Aid Department's regulation excluding the unborn child from the definition of a "dependent child" was contrary to the Social Security Act.* The Court recognized that *Edelman* precluded the retroactive payment of benefits, but, regarding the question of whether the Amendment barred the remanding of plaintiffs to state fair hearing procedures in order to recover benefits illegally denied, Chief Judge Fox held:

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* The Sixth Circuit by order reversed *Morris v. Houston* on the legality of the "unborn child" exclusion, based on the Supreme Court's opinion in *Alcala* v. *Burns*, 420 U.S. 575, 95 S. Ct. 1180, 43 L. Ed. 2d 469 (March 18, 1975).

The Court need not enter an order remanding the plaintiffs to state administrative procedures, because these procedures are available to them without such an order . . . The Eleventh Amendment operates as a jurisdictional bar on this Court in limited circumstances, but the duties of the state remain intact and enforceable by other means than direct injunctive order by a federal court for the payment of retroactive benefits. The Court cannot presume that the state will violate its own regulations but should it do so, the aggrieved parties will certainly have an action in state or federal court. The members of the plaintiffs' second subclass [needy pregnant women and their unborn children who applied for AFDC benefits in Michigan after the date of the injunction] cannot utilize the state procedures unless they are notified of their existence. Therefore the injunction to be issued will enjoin the defendants to inform the members of the plaintiffs' second subclass that they may apply for retroactive benefits through the state hearing procedure, and shall also give the members of the subclass precise information as to the means of application. In these and other particulars, the notice should follow the form and content required by state and federal regulations for similar notifications, due allowance being made for the special circumstances of this case. *Houston* at 15-16.

The foregoing cases clearly demonstrate that the 11th Amendment is no bar to the requested relief.

The cases cited by defendants in support of their position do not address the issue of notice. *Alcala v. Burns,* 494 F.2d 743 (8th Cir. 1974), held that the 11th Amendment prohibited an award of retroactive payments. That Court, which also decided *Doe v. Gillman, supra,* based its holding on an earlier decision in which it directly resolved the question of whether the 11th Amendment bars retroactive relief. *Taylor v. Lavine,* 497 F.2d 1208, 1213 (2d Cir. 1974) is inapposite, even though the Second Circuit considered plaintiff's appeal from the District Court's denial of retroactive payments, inasmuch as the Second Circuit reversed the District Court's finding that the New York regulations were invalid under the Social Security Act. In *Taylor v. Hill,* 377 F.Supp. 495 (W.D. N.C. 1974) the District Court granted a preliminary injunction on the grounds, *inter alia,* that plaintiff would suffer irreparable harm resulting from the court's inability to award retroactive payments, where welfare benefits have been unlawfully withheld. *Barron v. Bellows,* 496 F.2d 1198 (5th Cir. 1974), simply denied retroactive injunctive relief and financial assistance to members of the plaintiff class. Similarly, *Owens v. Roberts,* 377 F. Supp. 45 (M.D. Fla. 1974), in light of *Edelman,* granted defendant's motion to amend a judgment which had awarded retroactive benefits to members of the affected class. A more relevant consideration in *Owens* was the Court's determination of whether the state should be required "to identify the members of the affected class" for the purpose of "grandfathering" them into the Federal Supplemental Security Income Program, which assumed responsibility as of January 1, 1974 for the state AABD program. The Court concluded that such a burden should not be placed on the state because of, *inter alia,* the inordinate expense and extant alternative means of identification. It is noteworthy that the Court apparently assumed that the 11th Amendment would not bar such an order.

Defendants contend in a supplemental brief that the Seventh Circuit's denial of plaintiffs' request for declaratory judgment on remand and defendants' assertions before the Seventh Circuit, in opposition to plaintiff's request which argued that the 11th Amendment barred any type of relief pertaining to retroactive benefits, settled the question of whether the relief presently requested by plain-

tiffs is barred by the 11th Amendment. We disagree. The Seventh Circuit Order, pursuant to *Edelman*, only reversed the District Court's award of retroactive benefits and ordered the modification of the District Court judgment with respect to the retroactive entitlement of Illinois applicants for aged and blind benefits under 45 C.F.R. § 206.10. Even if the Court of Appeals had held that the *Edelman* decision bars the granting of declaratory relief regarding retroactive benefits, such a holding would not necessarily bar the relief now requested by plaintiffs.

Defendant's final contention is that plaintiffs are estopped by their pleadings to request that notices pertaining to the existence of state administrative remedies be sent out. It cites *Sinclair Refining Company v. Thompkins*, 117 F.2d 596 (5th Cir. 1941); *Jones v. Hopper*, 410 F.2d 1323 (10th Cir. 1969); *Hall v. U.S.*, 314 F.Supp. 1135 (N.D. Cal. 1970), in support of this contention.

The cases cited by defendant stand for the proposition that allegations of fact pleaded by a plaintiff are binding. In *Thompkins*, plaintiff's allegation that a small blaze existed when she threw kerosene on the fire, which led to an explosion, was conclusive of her contributory negligence. In *Hopper*, plaintiff's allegation that his termination was not a breach of contract was conclusive as to the non-existence of the contract. In *Hall*, plaintiff's allegations relating to when he learned that his wife was sterile and that it allegedly resulted from negligent treatment by a military doctor was binding in determining whether his action was time barred.

In the instant case, plaintiffs' allegations that "[n]o adequate administrative remedy or remedy at law is available to the plaintiffs" are not factual assertions which would be binding on plaintiffs. Rather they are legal judgments. As such, they are subject to judicial scrutiny and do not fall into the category of allegations relating to objective phenomena or facts existing irrespective of an observer's interpretation. Even if the instant allegations were not distinguishable from those present in the authorities cited by defendant and even if we found that those allegations were binding upon the instant request, that finding would not have the effect of precluding the sending of notices, inasmuch as it is not inconsistent for plaintiff to maintain that "adequate" remedies are not available and simultaneously request that notices be sent regarding the existence of available albeit less than adequate remedies. In each of the cases cited by defendants the plaintiff's later position was inconsistent with the binding pleadings.

For the foregoing reasons, plaintiffs' motion to require the State of Illinois to send plaintiff class members notices regarding the existence of possible state administrative remedies is granted. In this connection, defendants have requested a stay of the effective date of our order pending appeal to the Seventh Circuit and ultimately, perhaps, to the United States Supreme Court. While it is logical that no notices should be sent until the validity of our order has been finally determined, we see no reason why the state should not currently compile the names and addresses of all members of the plaintiff class who would be entitled to such notice. There has been serious question raised as to whether the state has compiled and is maintaining the necessary records from which such a list could be prepared. The claims here relate to the period July 1, 1968

—April 16, 1971. In order to protect against any possible loss or destruction of the necessary records and to insure that notices can be sent out immediately in the event our order is approved, the state is ordered to prepare the list of names and addresses of the persons to whom such notice would be sent but sending of the notices is stayed pending appeal. An appropriate order will enter.

/s/ HUBERT L. WILL
UNITED STATES DISTRICT JUDGE

Dated: August 22, 1975

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Caption omitted in printing]

FINAL JUDGMENT AND INJUNCTION

This cause coming on to be heard pursuant to the order and mandate of the Seventh Circuit, and the motions of the parties, and the memorandum opinion of the Court issued August 22, 1975,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. The Plaintiffs' motion to require notice to members of the plaintiff class is granted.

2. The defendants' motion to deny plaintiffs' request for notice to members of the plaintiff class is hereby denied.

3. Paragraph 5 of the judgment in this cause entered on March 15, 1972, granting retroactive benefits to members of the plaintiff class is hereby vacated, and the following paragraphs are substituted in place thereof as paragraph 5.

> The defendant James L. Trainor, Director, Illinois Department of Public Aid, his agents, employees, attorneys and those in active concert and participation with them, are hereby enjoined, to notify each member of the plaintiff class (as defined below) that he has been denied assistance benefits, with the amount specified in each individual case, and that he may attempt to recover those benefits by signing a notice of appeal (which is to be enclosed therein, together with a return envelope) contesting the denial of those benefits, and returning it in the enclosed envelope. The defendants shall send to each member of the plaintiff

class, except those persons who previously were mailed written notice of the denial of said benefits, the notice attached hereto as Exhibit A. The notice of appeal to be sent to members of the plaintiff class is attached hereto as Exhibit B.

The members of the plaintiff class are defined as all applicants for Aid to the Aged, Blind, and Disabled (hereinafter "AABD") in the State of Illinois who applied between July 1, 1968, and April 16, 1971, and were determined eligible for AABD, as follows:

(a)

Aged and blind applicants whose first full AABD check was not mailed within thirty (30) days from the date of application. These persons may appeal the denial of AABD assistance for the period beginning with the thirtieth (30th) day from the date of application to the date the applicant's entitlement to AABD became effective.

(b)

(i) Disabled applicants who applied between July 1, 1968, and December 31, 1970, whose first full AABD check was not mailed within forty-five (45) days from the date of application. These persons may appeal the denial of AABD assistance for the period beginning with the forty-fifth (45th) day from the date of application to the date the applicant's entitlement became effective.

(ii) Disabled applicants who applied between January 1, 1971, and April 16, 1971, whose first full AABD check was not mailed within sixty (60) days from the date of application. These persons may appeal the denial of AABD assistance for the period beginning with the sixtieth (60th) day from the date of application to the date the applicant's entitlement became effective.

The defendant James L. Trainor, Director, Illinois Department of Public Aid, his agents, employees, and attorneys shall submit to the Court within sixty (60) days of

this judgment the names and addresses of all members of the plaintiff class, and the amount of benefits denied in each individual case. The sending of the notices to each individual member of the plaintiff class, as required above, however, shall be stayed pending appeal, if any, of this cause.

The defendant James L. Trainor, Director, Illinois Department of Public Aid, his agents, employees, and attorneys, shall issue timely instructions to caseworkers, hearing officers, and other appropriate personnel consistent with, and in furtherance of, this final judgment and injunction.

/s/ HUBERT L. WILL
UNITED STATES DISTRICT COURT JUDGE

Date: August 22, 1975

EXHIBIT "A"

Date:

Illinois Department of Public Aid

NOTICE OF RIGHT TO APPEAL DENIAL OF BENEFITS

When you applied for Aid to the Aged, Blind, and Disabled in the period between 1968 and 1971, your application was delayed in processing. As a result of the delay, you were denied public assistance to which you were entitled in the amount of $———. As a result of a federal court order, the Illinois Department of Public Aid is required to notify you of this denial of benefits, and is also required to inform you that you may file a notice of appeal challenging the denial of benefits. Enclosed herewith is a Notice of Appeal which you should complete and mail to the Illinois Department of Public Aid in the enclosed postage paid envelope, if you wish to appeal the denial of your benefits. This notice of appeal must be mailed within sixty (60) days from the date of this notice.

If you have any questions in connection with this matter, you may call the attorneys in the federal lawsuit who have been representing the class of aged, blind, and disabled persons who were illegally denied benefits. (Legal Assistance Foundation of Chicago, [312] 939-5940. Call Collect.)

EXHIBIT "B"

Illinois Department of Public Aid

NOTICE OF APPEAL

I, _____ of _____
Appellant's Name Street or RFD

_____, Illinois _____
City County Telephone Number

hereby appeal to the Illinois Department of Public Aid for a fair hearing because of the

(X) action
or (check one)
( ) inaction

of the _____ County Department of Public Aid. My reason for requesting a fair hearing is: (Please be as clear and specific as you can in stating the county department action (or inaction) from which you are appealing.)

The department illegally delayed in the processing of my AABD application, and, as a consequence, denied me benefits to which I was and am entitled.

Your Case Number _____

Type of Program_____

_____
Appellant's Signature

Please notify:

Legal Assistance Foundation of Chicago
Re: JORDAN Case
64 East Jackson Boulevard
Chicago, Illinois 60604

_____
Date

*My race is: [ ] White; [ ] Negro; or [ ] Other

FOR AGENCY OFFICE USE:
TO BE COMPLETED BY THE COUNTY DEPT.

Date this Notice of Appeal received _____

Date of written or oral request for this hearing, if preceding this form _____

Date of Decision appealed from _____

Case Name _____ Case Number _____

NOTE: The county department will assist you in preparing the above form. Upon completion, file the notice with the county department, or with the Illinois Department of Public Aid, Hearing Officer, 209 West Jackson Blvd., Room 801, Chicago, Illinois 60606. You are entitled by law to a final decision on your appeal within 90 days from the time you requested the appeal, unless you have requested a delay of your hearing.

*Federal reporting requirement

IN THE

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 75-1908
JOHN JORDAN, et al.,

Plaintiffs-Appellees,

v.

JAMES L. TRAINOR, Director, Illinois Department of Public Aid, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 71 C 70 —HUBERT L. WILL, *Judge.*

Argued December 2, 1975 — Decided March 10, 1977

Before PELL and BAUER, *Circuit Judges,* and WHELAN, *District Judge.**

WHELAN, *District Judge.* This action has, prior to this appeal, been upon appeal to this court and thereafter was before the United States Supreme Court after a grant of certiorari. Involved in the earlier appeal was the validity of a judgment of the United States District Court whereby the Defendants-Appellants (officials of Illinois Department of Public Aid) were ordered to process Aid to the Aged, Blind, or Disabled Program applications in the

* United States District Judge Francis C. Whelan of the Central District of California is sitting by designation.

State of Illinois in conformity with federal regulations. Defendants-Appellants were also ordered to release and remit payments under such Program which had been wrongfully withheld from applicants, who were members of the original plaintiff class as framed in the complaint.

On the first appeal the Defendants-Appellants contended that the Eleventh Amendment to the United States Constitution barred the exercise of the court's equitable powers to award such retroactive benefits against the state. On such first appeal, this court affirmed the judgment of the District Court, holding that the Eleventh Amendment did not bar the exercise of the court's equitable power to award such retroactive benefits against the state. The court also held, in the alternative, that the State of Illinois has constructively consented to suit by participating in the Federal Aid to the Aged, Blind, or Disabled Program.

In *Edelman v. Jordan*, 415 U.S. 651 (1974), the United States Supreme Court stayed the granting of the retroactive relief pending appeal and thereafter reversed the decision of this court which had allowed such retroactive relief. The Supreme Court at page 677 of its opinion stated: "a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief . . . and may not include a retroactive award which requires payment of funds from the state treasury. . . ." This court thereafter remanded the case to the District Court; such order of remand stated in pertinent part: "Pursuant to the mandate of the Supreme Court it is ordered that the district court's award of retroactive benefit payments to plaintiffs is reversed and the cause remanded to the court below with instructions to modify its judgment as necessary in order to insure that entitlement need not attach to applicants in Illinois any earlier than required by the version of 45 C.F.R. § 206.10 in force on the date of application."

On remand, the District Court heard a motion of Plaintiff-Appellee to require notice to members of the plaintiff class. The District Court Judge granted such motion and ordered that the officials of the Illinois Department of Public Aid send a written notice entitled "Notice of right to appeal denial of benefits" to each member of the plaintiff class whose application was delayed in processing during the period between 1968 and 1971. Such notice required the state officials to set forth the amount of public assistance "to which you were entitled" for the particular person to whom the notice was ordered sent. It appears from the briefs of both parties that such notice was ordered sent to approximately 20,500 persons. Also, the notice advised the particular person notified that such person "may file a notice of appeal challenging the denial of benefits." The court further required the state officials to enclose, to each person being notified, a notice of appeal "challenging the denial of benefits." Such notice of appeal by its terms set forth the following language as grounds for appeal: "The Department illegally delayed in the processing of my A.A.B.D. application and as a consequence denied me benefits to which I am entitled."

On this appeal Defendants-Appellants contend that the order of the United States District Court requiring such notice, together with a form of notice of appeal, to be mailed to each member of the plaintiff class, is barred by the Eleventh Amendment. We hold that the Eleventh Amendment constitutes a bar to the trial court's order requiring such notice.

The sending of the particular notice and the form of notice of appeal will order, in effect, the payment of state funds by retroactive award to the members of the plaintiff class for past action or inaction by the State of Illinois. In the form of notice to be sent, there is an admission by

the State of Illinois that each member of the plaintiff class was "denied public assistance to which you were entitled" in an amount to be stated in such notice. Unquestionably the person receiving such notice would thereupon file the notice of appeal which was forwarded to him or her. In view of the admission of liability by the state, the course of such appeal would automatically result in payment of state funds. The payment would occur as the result of the judgment of the District Court here appealed from.

The District Court stayed that part of the order directing the mailing of the notice and form of notice of appeal pending appeal of this case; however, that portion of the order requiring the Illinois Department of Public Aid to compile a list of all of the persons entitled by the terms of the order to such notice was not stayed pending appeal.

The Supreme Court in *Edelman* at pages 677-678, makes it very clear that the Eleventh Amendment is in substance a jurisdictional bar to the exercise of federal judicial power concerning past action or inaction of a state with respect to the Aid to the Aged, Blind, or Disabled Program. The granting of any type of relief constituting entitlement to retroactive benefits claimed against the state is therefore precluded in this case.

Fitzpatrick v. *Bitzer,* 427 U.S. 445, 96 S. Ct. 2666, 49 L. Ed. 2d 614 (1976), does not support the position of Plaintiffs-Appellees. It is true that the Supreme Court there reversed the decision of the Court of Appeals which had barred monetary relief to the appellants therein. However, the relief sought against the State of Connecticut in *Fitzpatrick* was for, *inter alia,* damages for past acts of Connecticut state officials in violation of Title VII of the Civil Rights Act of 1964. The Supreme Court made it clear that it was granting the right of employees to sue the state

for violation of Title VII because of the power given to Congress by Section 5 of the Fourteenth Amendment to enforce the substantive provisions of the Fourteenth Amendment. Section 5 specifically provides that the Congress shall have power to enforce the provisions of the Fourteenth Amendment by appropriate legislation. Thus, Congress had the power in passing Title VII to include states as parties-defendant in order to enforce the rights of persons to have equal protection of the laws. It also had the power to require a state to satisfy its duties with respect to its treatment of private individuals.

Fitzpatrick further indicates that Plaintiffs-Appellees in the instant case are not entitled to the relief given by the District Court. In *Fitzpatrick* the Supreme Court restated the *Edelman* doctrine when, in referring to *Edelman,* it stated: "We concluded that none of the statutes relied upon in *Edelman* contained any authorization by Congress to join a state as a defendant. . . . The provisions of the Social Security Act relied upon by plaintiffs [in *Edelman*] were held by their terms not to 'authorize suit against any one.' " *Fitzpatrick* v. *Bitzer, supra,* 427 U.S. at 452, 96 S. Ct. at 2669. Nor do any of the other authorities cited by Plaintiffs-Appellees support their position.

It should further be noted that the terms of the judgment of the District Court here on appeal fixed various times during which the various members of the plaintiff class could appeal the denial of A.A.B.D. assistance.

When the action is, in essence, one for the recovery of money from the state, and the action is not brought under a statute enforcing a right against a state under the Fourteenth Amendment, the state is entitled to invoke its sovereign immunity from suit. *See Ford Motor Company* v. *Department of Treasury,* 323 U.S. 459 at 464 (1945).

Subsequent to oral argument in this case, pursuant to former Circuit Rule 29 (now Rule 11), the appellees cited the case of *Lewis v. Shulimson,* 534 F.2d 794 (8th Cir. 1976), *stay granted,* 426 U.S. 902, as supporting their principal position. We find the support lacking. It is true that that abbreviated opinion does approve a district court order requiring a state welfare division to notify members of the appellee's class who were denied medical assistance in violation of the district court's order. The state authorities in *Lewis* challenged the order on the basis that it would require the expenditure of public funds in the process of notification, thereby violating the Eleventh Amendment. The court held that this processing expense was permissible in that it had only an ancillary effect under *Edelman.* The court pointed out in *Lewis,* at 795, that the district court order did not require the state to make any retroactive medical payments. That the processing expenditures were all that was involved is clear from the district court opinion referring to the fact that the complaint sought an injunction "from *further* denying medical assistance." [Emphasis added.] *Lewis v. Shulimson,* 400 F. Supp. 807, 808 (E.D. Mo. 1975).

Appellees' reliance upon *Lewis* is misplaced. In the present case the state authorities are contending that the district court order while not directly ordering retroactive payments is for all practical purposes doing so. We agree. Further, we note various district court cases cited to us regarding the matter of giving and processing notification of benefits to welfare recipients, some of these cases being pre-*Edelman.* We find no persuasive authority in these cases contrary to the position we reach in the present case.

The language of *Edelman* directed to the prior order in this litigation appears to us to be directly applicable to the district court order now under review:

> [I]t is in practical effect indistinguishable in many aspects from an award of damages against the State. It will to a virtual certainty be paid from state funds, and not from the pockets of the individual state officials who were the defendants in the action. It is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials.

415 U.S. at 668. In sum, we decline to countenance the accomplishment of a prohibited end by indirection. The action of the district court in fact did not comply with our earlier remand. That remand ordered, in substance, that the district court judgment be modified to insure that entitlement need not attach to Plaintiffs-Appellees for retroactive benefits and the judgment was not so modified but instead was recouched in a form designed "in practical effect" to achieve the original goal.

For the foregoing reasons, the judgment of the district court dated August 22, 1975, is reversed and the cause is remanded to the district court for further proceedings consistent herewith.

REVERSED and REMANDED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 75-1908

JOHN JORDAN, et al.,

Plaintiffs-Appellees,

v.

JAMES L. TRAINOR, Director, Illinois Department of Public Aid, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 71 C 70—Honorable HUBERT L. WILL, *District Judge.*
ARGUED JUNE 8, 1977—DECIDED OCTOBER 19, 1977

Before, FAIRCHILD, *Chief Judge,* and SWYGERT, CUMMINGS, PELL, SPRECHER, TONE, BAUER, and WOOD, *Circuit Judges.*

WOOD, *Circuit Judge.* In 1971 plaintiffs filed this class action seeking declaratory and injunctive relief alleging failure of the Illinois Department of Public Aid to process applications for assistance under the Aid to the Aged, Blind and Disabled program (AABD) within the time limits prescribed by federal regulations. Plaintiffs sought to have entitlement attach at the end of the federal time limit. The district court in an unreported decision required by permanent injunction that defendants comply in the future with the time limits and awarded retroactive benefits. Upon appeal that judgment was affirmed. *Jordan v.*

Weaver, 472 F.2d 985 (7th Cir. 1973). The Supreme Court granted certiorari, and in a five to four decision reversed upon Eleventh Amendment grounds so much of the decree which ordered retroactive payment of benefits found to have been wrongfully withheld but left undisturbed the purely prospective relief. *Edelman v. Jordan,* 415 U.S. 651 (1974). Thereafter this court remanded the case to the district court. After remand, plaintiffs filed a motion for an "order requiring the defendants to notify the members of the plaintiff class of their possible entitlement to retroactive benefits and their right to apply for benefits within sixty days through the state's administrative procedures, and requiring said defendants to include with such notice a form returnable to the Department of Public Aid upon which such persons may indicate their desire to appeal." Over the defendant's Eleventh Amendment objections the motion was allowed. *Jordan v. Trainor,* 405 F. Supp. 802 (N.D. Ill. 1975). The trial court's order set forth the form of the Notice of Right to Appeal Denial of Benefits to be used by the Department and the Notice of Appeal to be used by the applicant. On appeal of that order a panel of this court reversed holding that the Supreme Court in *Edelman* had interpreted the Eleventh Amendment to be a jurisdictional bar precluding any type of retroactive relief. *Jordan v. Trainor,* 551 F.2d 152 (7th Cir. 1977). A Petition for Rehearing In Banc was granted.[1]

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1. United States District Judge Francis C. Whelan of the Central District of California was a member of the three-judge panel which decided *Jordan.* Judge Whelan did not, however, participate in this court's vote on plaintiffs' suggestion for rehearing in banc. See FED. R. APP. P. 35.

The issue being reconsidered is whether or not the Eleventh Amendment bars the proposed limited use of the court's equitable power in these circumstances. Defendants do not urge upon us the view that there is no "case or controversy" as required by Article III, Section 2 of the Constitution. That problem was referred to by Judge Garth in his concurring opinion in *Fanty v. Commonwealth of Pennsylvania, Dept. of Public Welfare,* 551 F. 2d 2 (3rd Cir. 1976). In the present case the trial court determined that the class included applicants who had applied for AABD since July 1, 1968, and whose applications were not timely processed as required by federal regulations. In its judgment, in addition to its award to applicants of past benefits withheld, the trial court held certain applicable state regulations to be invalid and granted a permanent injunction requiring compliance with the federal time limits for processing and paying AABD applicants. Only the retroactive award provision was struck down by the Supreme Court. The basic controversy did not disappear. The notice problem we now face is a related aspect of the class controversy controlled by the trial court's permanent injunction.

The specified notice required by the district court to be sent to members of the class stated in part that "you were denied public assistance to which you were entitled in the amount of $ . . . . ." Enclosed with that notice was the other form, "Notice of Appeal," to be signed by the applicant and returned to the Illinois Department of Public Aid. That notice contained the language "The department illegally delayed in the processing of my AABD application, and, as a consequence denied me benefits to which I was and am entitled." We agree with the panel's opinion that

> "The sending of the particular notice and the form of notice of appeal will order, in effect, the payment of state funds by retroactive award to the members of the plaintiff class for past action or inaction by the State of Illinois. In the form of notice to be sent, there is an admission by the State of Illinois that each member of the plaintiff class was 'denied public assistance to which you were entitled' in an amount to be stated in such notice."

That admission was compelled by the order of the district court and appears to be a type of money judgment against the state. We agree that the district court's order controverts the Eleventh Amendment in this regard and cannot be sanctioned.

The objectionable content of the notice forms are not in keeping with the views expressed by the trial judge in his Memorandum Opinion to which they were attached. With those views, but not the forms, we agree.

The more delicate variation of that issue is the constitutionality of a mere explanatory notice to applicants advising them that there is a state administrative procedure available if they desire to have the state determine whether or not they may be eligible for past benefits. A simple returnable notice of appeal form could also be provided. Those notices would not be handicapped by any federal predetermination of state liability. The parties agree that there are or may be various defenses available to defendant which could be raised in the state proceeding. The federal court would in no way be involved in any determination of whether or not past benefits were in fact due from the state.

This court is not in agreement on the constitutionality of such limited relief as an adjunct to the purely prospective relief granted. Although we view it as a close question, we hold that in the context of this case a permissible notice may be fashioned within the strictures of the Eleventh Amendment. There is no longer a claim that the state

has waived its constitutional protection under the Eleventh Amendment. It is likewise conceded that the state, not merely an officer, would be directly involved in any relief granted. We realize there is little or no supporting precedent directly in point to give us complete confidence in our view, but we shall examine what we find.

We look for guidance to *Edelman v. Jordan, supra.* As the Court pointed out, the rule "has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred . . . ." 415 U.S. at 663. "*Ex parte Young* [209 U.S. 123 (1908),] does not extend so far as to permit a suit which seeks the award of an accrued monetary liability which must be met from the general revenue of a State. . . ." *Id.* at 664. The Court also noted that the retroactive portion of the district court's order required "the payment of a very substantial amount of money." *Id.* We learn also that the character of any relief ordered which may in practice resemble a money judgment payable out of the state treasury cannot be changed or made acceptable by labeling it "equitable" in nature. *Id.* at 666. What had been labeled "equitable restitution" was found to be indistinguishable in many aspects from an award of damages against the state. *Id.* at 668.

The form of notice we envisage would not create a "liability" against the state. Whether a liability might result would be a matter for state determination, not the federal court. No federal judgment against the state would be created. Such a notice could not be labeled equitable restitution or be considered an award of damages against the state. The defendant makes no issue out of any incidental administrative expense connected with the preparation or mailing of the notice. It has suggested in the record that the notice could be included in the regular monthly mailing.

The necessary information comes from a computer. There is no indication that the administrative expense would be substantial.

Looking further at *Edelman,* we see some suggestion that the Eleventh Amendment, even apart from *Ex parte Young,* may not be a total and complete bar so long as it does not constitute a retroactive award for damages to be paid by state funds. The Court commented that "we must judge the award actually made in this case, and not one which might have been differently tailored in a different case. . . ." 415 U.S. at 665. Similarly, the Court recognizes that "[a]s in most areas of the law, the difference between the type barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many instances be that between night and day." *Edelman* specifically overruled three recent cases in which the Supreme Court had summarily affirmed district court judgments requiring state directors of public aid to make similar retroactive payments as were originally ordered in this case by the district court. Although the list may not be intended to be complete, there is no mention of the three-judge decision, *Grubb v. Sterrett,* 315 F.Supp. 990 (N.D. Ind. 1970), summarily affirmed 400 U.S. 922 (1971).[2] That decision

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2. Footnote 13 of *Edelman* lists only the following cases: 1) *State Dept. of Health and Rehabilitative Services* v. *Zarat,* 407 U.S. 918 (1972), aff'g 347 F. Supp. 1004 (S.D. Fla. 1971); 2) *Sterrett* v. *Mothers' and Children's Right Organization,* 409 U.S. 809 (1972), aff'g unreported order and judgment of District Court (N.D. Ind. 1972) on remand from *Carpenter v. Sterrett,* 405 U.S. 971 (1972); 3) *Gaddis v. Wyman,* 304 F. Supp. 717 (S.D.N.Y. 1969) (order at CCH Poverty Law Rep. ¶ 10,506 [1968-1971 Transfer Binder]), aff'd *per curiam sub nom. Wyman v. Bowens,* 397 U.S. 49 (1970).

provided for notice to members of the class whose applications for Indiana public assistance had previously been denied under a regulation subsequently held to be invalid. The notice was to contain no prejudgment of state liability. The state was left to make the eligibility determination according to federal and state regulations. The cases specifically overruled by the Court, on the other hand, provided for actual retroactive payments. Thus we deem the omission of *Grubb* from the cases specifically overruled to be of some significance. As we read *Edelman*, we believe that the case allows limited flexibility and does not foreclose the modified relief we approve.

Plaintiff cites *Doe v. Gillman*, 479 F.2d 646 (8th Cir. 1973), *cert. denied*, 421 U.S. 920 (1975), as post-*Edelman* authority which left in effect, after a partial reversal, a requirement that the Iowa Department of Social Services send notice of eligibility to applicants previously denied benefits. The court of appeals found it unnecessary to resolve the Eleventh Amendment issue of retroactive payments since the court assumed that Iowa would follow its own regulations and that any retroactive payments owing would be made. The record in this case does not suggest that we indulge in a similar assumption to avoid a constitutional issue. Defendant dismisses *Gillman* both as a pre-*Edelman* case and because it avoids the Eleventh Amendment issue. Although the case was decided by the Eighth Circuit prior to *Edelman*, certiorari was denied by the Supreme Court after *Edelman*.

The plaintiff also cites *Lewis v. Shulimson*, 534 F.2d 794 (8th Cir. 1976), *cert. denied*, 430 U.S. 940. In that case notice was required to be given by the state to those in the class who had previously been denied medical assistance in violation of the court order. However, no retro-

active payments were involved. The decree was prospective in nature. *Lewis* is only slightly related to the present problem.

The defendant has called to our attention the recent case of *Fanty v. Commonwealth of Pennsylvania, Dept. of Public Welfare*, 551 F.2d 2 (3rd Cir. 1977). In that case the state had for a prior period of time attempted to collect from recipients certain previously paid social security benefits as reimbursement to the state. The plaintiff class alleged that this had been accomplished in an illegal manner. The practice of the state had been terminated prior to suit, but some applicants were still making reimbursement payments to the state under agreements entered into during the prior period. The district court did not attempt the restitution to applicants of benefits wrongfully collected by the state and denied declaratory and injunctive relief since current state practices were not in violation. The district court did, however, require the state to serve notice on two sub-classes. Those welfare recipients who were currently reimbursing the state under the prior agreements were to be notified that they were under no legal obligation to continue making reimbursements out of their federal disability benefits. Those welfare recipients who had been previously coerced and misled into making reimbursements in violation of the regulations were to be notified that as a matter of state law they might have a cause of action against the state. Each member of the appellate panel voted to reverse, but for varying reasons. Chief Judge Seitz was of the opinion that *Edelman* controlled since he viewed the district court's order as being "based on a past breach of legal duty" and granting relief not a "necessary consequence of compliance in the future with a substantive federal question determination." Judge Garth believed the Eleventh Amendment issue to be "border-

line," but reversed on the basis that there was no case or controversy. Judge Hunter dissented, and rather than require dismissal of the complaints voted to reverse and remand on the grounds that the requirements for summary judgment had not been met. He disagreed that *Edelman* required dismissal and would draw "no line so sharp" between the past and present aspects of that case. He further disagreed with Judge Garth by finding there to be a justiciable case. There are some factual distinctions between that case and the present case, but they are not so significant as to avoid conflict in principle with our present decision on the Eleventh Amendment issue. Since Judge Garth considered the Eleventh Amendment issue a borderline question and Judge Hunter was of the view that the Eleventh Amendment did not bar the notice relief, although he also recognized some problems with the form of the proposed notice, we do not view that case as strong authority to the contrary.

If our task was only to enforce the federal regulations, use our equitable powers and heed the admonition of the 82nd Psalm to "Do justice to the afflicted and needy," our decision would not be so difficult. It appears that the needed list of applicants and information is already available from the state computers and that the administrative cost to the state of the contemplated modified notice procedure would not be significant. No judgment for any award of damages against the state comes from the federal court. The members of the class will be given no more by the proposed modified notice than what they would have gathered by sitting in the courtroom, or by reading and listening to news accounts had the case attracted any attention. As for the state, our decision means only that if an appeal be filed in the future by a class member, the state may determine for itself by its own procedures whether any

back payment may be due the applicant. It cannot be strongly argued that the problem did not arise in part from a past breach. The district court rightfully curtailed the continuing breach as to the future by permanent injunction. What is now controlled by the permanent injunction and the proposed modified notice are all related and a part of the whole which affected the class. We believe a modified notice as suggested by this opinion is not barred by the Eleventh Amendment. We reverse and remand for additional proceedings not inconsistent with this opinion.

PELL, *Circuit Judge,* dissenting.

Being of the opinion that the constitutionally designated "inferior courts" who have vested in them the "judicial Power of the United States," should, in the orderly exercise of that vested power, refrain from attempting, no matter how artfully done, to accomplish by indirection that which has been specifically prohibited, particularly in the very litigation in which the prohibition was proclaimed, I respectfully dissent. The fact that the result may appear desirable from a societal point of view should play no part in the decision.

The case before the panel of this court, reported at 551 F.2d 152, involved, in my opinion, such an effort at indirection. The *en banc* majority opinion agrees that the panel properly struck down as violative of the Eleventh Amendment the order of the district court. The validity of that order was all that was presented to the panel for decision. The *en banc* majority opinion then proceeds to attempt to prescribe a constitutionally inoffensive form which the state authorities would be required to send to those persons precluded by the Supreme Court decision from collecting by direct judgment the very amounts which would be involved in the notices to be sent.

The Supreme Court in reversing the first order of the district court as affirmed by this court did so on the basis that the order would result in a situation which "is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials," 415 U.S. at 668.

Now, notwithstanding laundering efforts in this court, the refined order outlined in the *en banc* majority opinion will still, upon any realistic analysis, result in a situation which "is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials."

This court, in my respectful opinion, should not lend its hand to such subterfuge.

TONE, *Circuit Judge,* dissenting. Judge Wood's opinion for the court presents an appealing solution to the Eleventh Amendment problem. In my view, however, the Supreme Court's decision that a federal court may not retroactively enforce the plaintiffs' rights against the state, *Edelman v. Jordan,* 415 U.S. 651, 658, *et seq.* (1974), precludes us from entering an order aimed solely at retroactive enforcement, albeit in another form.

BAUER, *Circuit Judge,* dissenting. I join in the dissents of Judges Pell and Tone.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit